U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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April 19, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Highways and Transit

FROM: Subcommittee on Highways and Transit Staff

SUBJECT: Hearing on "Buy America"

PURPOSE OF HEARING

The Subcommittee on Highways and Transit is scheduled to meet on Tuesday, April 24, 2007, at 2:00 p.m., to receive testimony on the implementation of statutory requirements relating to the use of domestically produced materials, products, and components in federally-assisted highway and transit projects (commonly known as Buy America). The Subcommittee will hear from the Administrators of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), officials of a state department of transportation and a transit agency, and representatives of a steel bridge manufacturer and a transit fare collection systems manufacturer.

BACKGROUND

In 1933, as part of the government's response to the Great Depression, Congress enacted the Buy American Act (the 1933 Act). The 1933 Act provides that: (1) only articles, materials, and supplies mined, produced or manufactured in the United States can be used for public projects; and (2) all contractors for public construction projects in the United States must use only domestic materials. The 1933 Act applies only to direct purchases of goods by federal agencies, not to grants made by federal agencies or to purchases by state and local governments with federal funds. The purpose of the 1933 Act was to require the federal government to spend taxpayers' dollars only on goods produced in the United States, thereby fostering and protecting American industry and workers.

Federal-Aid Highway Program

Buy America requirements were first included in highway law in the Surface Transportation Assistance Act of 1982. The provision has been revised several times. Currently, the Secretary of

Transportation (Secretary) is prohibited from providing federal assistance for a highway project unless the steel, iron, and manufactured products used in the project are produced in the United States.

However, the Secretary is authorized to waive the Buy America requirements if (1) applying those requirements would not be in the public interest, (2) the materials and products are not produced in the United States in reasonably available quantities or a satisfactory quality, or (3) using such domestic materials would increase the cost of the overall project contract by more than 25 percent.

Current controversies concerning Buy America requirements in the federal highway program center mainly on bridge projects, specifically the test used to determine if the contract cost of using domestic steel to build a bridge exceeds the contract cost of using foreign steel by more than 25 percent.

Domestic steel bridge fabricators contend that the language in the law refers to "projects", and as such, the test should be conducted on the basis of an entire project. By allowing project sponsors to divide a bridge project into several smaller segments and then evaluate the costs of domestic versus foreign steel separately on each of the contracts for each individual segment, some people contend that FHWA is not implementing the statutory provision according to congressional intent.

However, the language in the law specifically refers to "overall project contract" costs. For a variety of reasons, most large highway projects are broken into segments and different contracts are executed for each individual segment. FHWA applies the 25-percent threshold for the waiver to each individual contract.

FHWA also points to the specific reference in the law to the word "obligate" when justifying why the 25-percent threshold is applied to each individual contract. Federal highway law prohibits the Secretary from "obligating" federal funds for a project unless the Buy America requirements are satisfied. In obligating federal funds under the federal highway program, FHWA defines projects on the basis of contracts. In other words, the scope of work (project) and the cost of such work are defined in a contract. Federal funds are obligated to a project through the execution of a project agreement. There is a project agreement for each contract. In a complex project such as building a bridge, the overall project is usually broken into separate segments such as the foundation, superstructure, deck, and approaches. A construction contract is awarded for each of the segments to the lowest responsible bidder. From the federal fund obligation standpoint, each contract represents a project. Thus, the overall bridge project that encompasses a number of contracts is not considered one project but a series of projects each defined by its contract.

The effect of FHWA's approach to defining "projects" is that some segments of an overall bridge project may meet the 25-percent additional-cost threshold and qualify for waivers under the Buy America requirements if the test is conducted separately for each segment of the overall project.

A current example of that is the San Francisco Oakland Bay Bridge. The East Span Seismic Safety Project is comprised of as many as 16 contracts. The single most expensive segment, the Self-Anchoring Suspension Superstructure with an estimated contract cost of $1.4 billion, will receive a waiver from the Buy America requirements because the contract cost of using domestic steel in one design was determined to exceed the contract cost of using foreign steel in another design by more than 25 percent. The contract cost of using domestic steel was $1.8 billion. By using foreign steel, the California Department of Transportation was able to save $400 million. Had the test not been conducted on only that contract, but on the bridge as a whole, the higher cost of using domestic steel for the superstructure would have been spread over a larger cost base of more than $5 billion, and would have fallen short of the 25-percent threshold for the waiver.

It is also important to note that an American company had the low bid for this contract. The Pennsylvania-based American Bridge Company won this contract, and will be using steel fabricated in China, Korea, England, and the U.S. to construct the superstructure.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005 (SAFETEA-LU) included a Sense of Congress to clarify congressional intent that the cost test required for a waiver from the Buy America requirements be applied to an entire bridge project and not separately to segments of the project. However, FHWA did not revise its guidance or regulations on this issue, and continues to apply the 25-percent threshold for the waiver based on the "project contract" cost.

In response, the House adopted two provisions in the SAFETEA-LU technical corrections bill (H.R. 1195) earlier this year. These provisions would (1) make clear that the current application by FHWA of the Buy America test to segments of a bridge project is inconsistent with the Sense of Congress adopted by Congress in SAFETEA-LU, (2) require the Secretary, in the interest of transparency, to provide a detailed justification for a waiver and a reasonable opportunity for notice and public comment, and (3) require the Secretary to submit an annual report to the authorizing committees detailing the waivers granted.

Federal Public Transportation Program

Legislative History of Transit Buy America Requirements

Buy America requirements were first included in the Surface Transportation Assistance Act of 1978 (STAA) and were applicable to the expenditure of Federal funds received under Federal Transit Administration (then Urban Mass Transportation Administration) grant programs in section 401 of STAA. This legislation established a domestic preference for "articles, materials, supplies mined, produced, or manufactured" in the United States. The House report accompanying STAA stated that the provision was added:

> *to protect American manufacturers and suppliers who have suffered substantial losses as a result of competition from foreign imports, which, in many cases, are underpriced because of governmental financial support and cheap labor costs. The loss of business by domestic companies adds to the trade deficit, fuels inflation and leads to unemployment and reduced productivity.*

Congress strengthened transit-related Buy America provisions in the Surface Transportation Assistance Act of 1982, the Surface Transportation and Uniform Relocation Act of 1987 and in the Transportation Equity Act for the 21st Century (1998). The transit Buy America provisions are codified at 49 U.S.C. 5323(j), and 49 CFR 661 contains Federal Transit Administration (FTA) regulations to implement and administer the requirements.

The transit Buy America requirements divide Federally-funded procurements into three categories: steel and iron, manufactured goods, and rolling stock. Steel and iron and manufactured goods must be of 100 percent domestic origin and the manufacturing process must take place in the United States. Rolling stock procurements must be of at least 60 percent domestic origin and final assembly of the bus or rail car must take place in the United States. Domestic origin is determined by the cost of a component's subcomponents that are considered to be domestic material. Any procurement of a component or of an end product made up of components is subject to Buy America requirements. However, a procurement of subcomponents alone is not subject to the requirements.

During the period of time leading up to reauthorization, transit stakeholders, including public agencies and business members, expressed concern and frustration to the Committee on Transportation and Infrastructure regarding the "shifting" nature of an end product as defined under 49 CFR 661, which is dependent upon how the item is specified in a procurement contract. Using this definition, the same item can be an end product under one procurement contract but merely a component, or even a subcomponent, under the terms of another contract. The majority of transit industry representatives who contacted the Committee were seeking greater predictability. In addition, the Committee wanted to establish a more transparent process regarding the issuance of waivers, to ensure that such waivers were issued on a purely objective basis and that the public had an opportunity to comment on proposed waivers. Other issues brought to the Committee by the transit community included concerns regarding microprocessors, and a desire for procedures to be established for negotiated procurements.

SAFETEA–LU Changes to Transit Buy America Requirements

SAFETEA–LU strengthens the Buy America requirements by repealing a general waiver for 15 passenger vans and wagons produced by Chrysler Corporation, and by requiring that FTA publish a detailed written justification in the Federal Register – with a comment period – when issuing a public interest waiver. SAFETEA-LU also provides greater predictability to transit agencies and manufacturers by requiring that the Secretary issue a rule that: clarifies the microprocessor waiver; defines end product, negotiated procurement, and contractor; allows for a post-award waiver; and includes a certification under a negotiated procurement process. This rulemaking is currently in progress.

On November 28, 2005, the FTA published a Notice of Proposed Rulemaking (NPRM) in the Federal Register (70 FR 71246) that discussed several SAFETEA–LU mandates and proposed to provide further clarification of existing FTA decisions on Buy America. Due to the complexity of many of the Buy America issues addressed in the NPRM and the divergence of opinion in important areas, FTA issued a final rule that addressed fewer subjects than addressed in the NPRM (71 FR 14112, Mar. 21, 2006). The topics covered in this final rule included: (1) Administrative review; (2) the definition of "negotiated procurement"; (3) the definition of "contractor"; (4) repeal of the general waiver for Chrysler vans; (5) certification under negotiated procurements; (6) pre-award and post-award review of rolling stock purchases; and (7) miscellaneous corrections and clarifications to the Buy America regulations.

On November 30, 2006, FTA issued a Second Notice of Proposed Rulemaking (SNPRM) to address six issues identified in the NPRM but not covered in the final rule, and one new issue: (1) a publication process for public interest waivers to provide an opportunity for public comment; (2) clarification of Buy America requirements with respect to microprocessor waivers; (3) new provisions to permit post-award waivers; (4) clarifications in the definition of "end products" with regard to (a) components and subcomponents, (b) major systems, and (c) a representative list of end products; (5) a clarification of the requirements for final assembly of rolling stock and a list of representative examples of rolling stock items; (6) expanding FTA's list of eligible communications, train control, and traction power equipment; and (7) an update of the debarment and suspension provisions to bring them into conformity with statutory amendments made by SAFETEA–LU. Formal comments on these issues have been submitted to FTA, and a final rule is expected by the end of the year.

WITNESSES

PANEL I

The Honorable J. Richard Capka
Administrator
Federal Highway Administration
Washington, DC

The Honorable James S. Simpson
Administrator
Federal Transit Administration
Washington, DC

PANEL II

The Honorable Will Kempton
Director
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Mr. John B Catoe, Jr.
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